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## **Guidance for Public Bodies in Managing Requests for Review under the *Access to Information and Protection of Privacy Act***

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### **Purpose**

This guide is written for public bodies who have received a request for review under the *Access to Information and Protection of Privacy Act* (ATIPP Act). Topics include:

- providing records to our office, formatting and the inclusion of a schedule of records;
- key concepts of the ATIPP Act;
- the discretion to be used in evaluating whether to redact information;
- the need to reference Information and Privacy Commissioner (IPC) inquiry reports and legal tests where they exist;
- clarification of our processes, including legislated timelines; and
- what to expect when interacting with IPC investigators.

### **Format of records**

Numerous software applications exist to organize and redact records. The Government of Yukon ATIPP Office may be able to suggest a solution for your department. Regardless of which software is used, when providing records to our office for a review, public bodies must ensure that:

- pages are numbered;

- redacted information is clearly highlighted in a way that leaves the severed portions legible; and
- The ATIPP Act exception(s) being relied on to redact the information are clearly indicated next to the redacted information.

Our office prefers that the records be provided in electronic format through secure file transfer. If you are unfamiliar with using secure file transfer, our office can assist.

### Example of how to do redactions

**Subsection xyz** The Information and Privacy Commissioner (IPC) is responsible for ensuring the purposes of the ATIPP Act and HIPMA are achieved. For example that citizens have access to any information held by Public Bodies or personal or health information held by Public Bodies and Custodians. In the context of ATI, it is to ensure that Public Bodies and Custodians are providing access unless an exception applies. The IPC ensures any exception claimed is authorized by the Act. **Subsection xyz**

**IMPORTANT:** Where a record is withheld in full and more than one provision of the ATIPP Act is cited, the public body must clearly indicate which provisions apply to the specific information within that record, or if applicable, specify if all cited provisions apply to all of the information in the withheld record.

### Key concepts of the ATIPP Act

The ATIPP Act creates a **right of access** to any record in the custody or control of a public body.

*5 (1) A person who makes a request under section 6 has a right of access to any record in the custody of or under the control of a public body, including a record containing personal information about the applicant.*

### What is a record?

A record is **any recorded information**.

“record” includes books, documents, maps, drawings, photographs, letters, vouchers, papers and any other thing on which information is recorded or stored by graphic, electronic, mechanical or other means, but does not include a computer program or any other process or mechanism that produces records;<sup>1</sup>

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<sup>1</sup> Definitions, section 3.

## What is a responsive record?

A record is responsive to an access request if any part of the record responds to the parameters of the access request. This means that if one paragraph in a document matches the parameters of the access request, then that entire document (the record) is responsive to the access request.

## What information can public bodies sever?

*5 (2) The right of access to a record does not extend to information that is excepted from disclosure under this Part, but if that information can reasonably be separated or obliterated from a record an applicant has the right of access to the remainder of the record.*

Once a record is determined to be responsive to the access request, public bodies must complete a line-by-line review of the information in the record to determine if any exceptions to the right of access apply. Part 2 of the ATIPP Act outlines the exceptions to the right of access.

Some provisions are mandatory, meaning that the public body is **required** to redact the information, while others are discretionary.

Public bodies must exercise their discretion whenever the word “may” is included in an exception to the right of access. For discretionary exceptions the Department must demonstrate that when it exercised its discretion in deciding not to disclose the pages to the Applicant, it considered all the relevant factors weighing for or against disclosure, including whether it is **reasonably necessary** in the circumstance to refuse access to the record or information therein.

**IMPORTANT: For discretionary exceptions to the right of access, public bodies must provide details regarding the exercise of discretion prior to withholding the information.**

## Schedule of records

As a best practice, we recommend that public bodies provide applicants with a schedule of records (SOR). This helps reduce follow-up questions and even requests for review to our office caused by confusion surrounding the response received.

When the IPC receives a request for review, we require a detailed SOR be provided with the responsive records. The SOR provided to our office should include:

- the record number;
- the number of pages within the record;
- the corresponding page number(s) within the records package;

- the type of record (email, letter, handwritten note, spreadsheet, etc.);
- creation date of the record;
- who the record is from and to;
- whether access was granted in part or wholly refused;
- the exception(s) claimed for each record; and
- **a detailed rationale to support why the claimed exception(s) applies to the redacted information.** This may include IPC interpretations, decisions from other Canadian jurisdictions, explanations and context, facts, evidence, and supporting documentation.

Remember that our office has no prior knowledge of the records and we rely on the public body to provide sufficient explanations and context so that we can form an opinion about whether the cited ATIPP Act provision(s) applies.

**IMPORTANT: The burden of proof rests with the public body**, and as such it is not sufficient to simply cite the provision being relied on. On this topic, the IPC has stated:

*...it is incumbent on [the department] to provide submissions that enable it to meet its burden of proof. It is not enough for the department merely to state that it believes a provision in the ATIPP Act applies; rather, it must provide evidence to support this assertion.*<sup>2</sup>

See [APPENDIX 1](#) at the end of this document for an example of a schedule of records.

### IPC inquiry reports and legal tests

The IPC's interpretations of the ATIPP Act are **binding** on public bodies. This means that if the IPC has interpreted a section of the ATIPP Act, the public body's use of that provision must be consistent with the IPC's interpretation.

To verify whether a provision was interpreted by the IPC, a good place to start is our office's sectional index, [Sectional Index](#). Another resource is [CanLII](#). If you are not sure whether the IPC has interpreted a particular provision or if you have questions about the IPC's interpretation, our office can assist.

In most instances when the IPC interprets a provision, a **legal test** is set out for determining whether the provision applies. When a legal test has been set out by the IPC, public bodies **must** utilize it when determining whether the provision applies. If the test is not met, the public body cannot rely on that provision for refusing access to an applicant. IPC investigators also refer to these tests when completing a review. The table below includes some examples of legal tests and the inquiry reports they are set out in, but there are others.

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<sup>2</sup> [ATP16-031AR](#)

## Some common legal tests set out by the IPC

Provision of the ATIPP Act	Inquiry Report
<b>13 (2)(c)</b> – confirm or deny the existence of a record	<a href="#">ATP18-03R</a>
<b>16 (1)(a) and (b)</b> – advice, consultations, or deliberations	<a href="#">ATP17-36R</a>
<b>18 (b)</b> – existing or reasonably expected proceedings	<a href="#">ATP15-055AR, ATP16-031AR</a>
<b>19.1</b> – workplace harassment records	<a href="#">ATP16-031AR</a>
<b>Harm test</b> – applicable whenever the words “reasonably be expected to harm” appear in an exception to the right of access.	<a href="#">ATP15-055AR para. 116 to 119</a>
<b>Exercise of discretion</b> – applicable whenever the word “may” is included in an exception to the right of access.	<a href="#">ATP16-031AR para. 79 to 86</a>

## What to expect when interacting with IPC investigators

Investigators on the informal case resolution (ICR) team attempt to settle requests for review informally without the need for a formal inquiry by the IPC.

As subject matter experts, their role is to examine the unredacted copies of the records and form an opinion on whether the public body correctly applied the cited provisions of the ATIPP Act and has met its burden of proof.

Where the investigator does not have enough information to form an opinion about whether the cited provisions were correctly applied, they may ask the public body for more detailed explanations.

### ATIPP coordinators should be prepared to answer questions about:

- the legal tests they relied upon;
- the public body’s exercise of discretion if applicable;
- cases from other jurisdictions (if any) that support their decision to redact information from the records;
- evidence to support that the cited provision applies.

**TIP:** One common challenge we face relates to provisions where a “harm” may exist. Public bodies must identify the specific harm(s) and provide an assessment of the likelihood that the harm would occur if the records were released. To meet this threshold, the public must **provide evidence that the identified harm is probable.**

Where the investigator forms an opinion that a cited ATIPP Act provision does not apply to the redacted information, they will make informal recommendations to assist the public body in complying with the ATIPP Act. This may include a recommendation to release information to an applicant.

**IMPORTANT: Investigators on the ICR team are impartial and do not advocate for applicants or public bodies but evaluate whether the ATIPP Act has been correctly applied.**

**Information provided to the investigator during the ICR process is confidential and will not be shared with the applicant or be used in an inquiry.**

### Legislated timelines

Under the ATIPP Act, ICR investigators have up to a **maximum of 90 days** to settle a matter under review. Note that in certain circumstances this timeline may be shorter at the discretion of the IPC.

If the settlement period expires and the matter under review is unresolved, the file may move to formal inquiry. An inquiry is a formal adjudication where the IPC will *“decide all questions of fact and law arising in the course of the inquiry.”*<sup>3</sup> This process is similar to an adjudicative tribunal where parties will be asked to give submissions to support their case. You can find more information about the inquiry process here ([inquiry process](#)).

A crucial step in facilitating settlement is to ensure the investigator can complete their review of the records in a timely manner. This allows time for discussion between the parties which is often essential in settling a review.

Generally, our office requires the unredacted records, in the correct format, along with a detailed schedule of records **within 7 days of the date of the request for review**.

**IMPORTANT: The IPC will not extend the timeline for informal case resolution beyond the 90 days. If the review is not settled, the IPC will decide whether to conduct a formal inquiry to complete the review. Inquiry reports are published on the IPC's [website](#).**

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<sup>3</sup> ATIPP Act, Section 52 (1)

## APPENDIX 1

### Example of a schedule of records

Responsive records for #A-1234

Total pages: 325

Record #	Number of pages	Page # within records	Provision (s) cited	Record type	Creation date	From / to	Access granted in part (P), or refused (R)	Rationale / Comments
1	3	01-03	25 (2)(a) 25 (4)(a),(c) and (d)	email	Jan 1, 2018	From: Joe Smith  To: Jane Doe	P	<p>25 (2)(a) The email contains information relating to a third party's (NAME) medical history.</p> <p>Paragraph 25 (2)(a) outlines that personal information relating to a third party's "medical, psychiatric or psychological history, diagnosis, condition, treatment, or evaluation" is <b>presumed</b> to be an unreasonable invasion of personal privacy.</p> <p>25 (4)(a), (c) and (d) Before refusing to disclose the information, the public body considered the factors in subsection 25 (4). In our view, the factors in 25 (4)(a), (c), and (d) weigh in favour of refusing to disclose the information to the applicant.</p>

2	1	04	16 (1)(a)	Email w/ Word doc attachment	June 2, 2018	From: Joe Blow  To: John Doe	P	<p>16 (1)(a)</p> <p>Referring to the IPC’s legal test for the application of this provision (ATP17-36R), the public body determined that the record was created by and for the public body.</p> <p>Employees of the public body (NAME 1, NAME 2, NAME 3) developed the document. These employees (include titles) had responsibility for creating the document by virtue of their employment responsibilities.</p> <p>The information in the document is directed toward taking an action – (name the action).</p> <p>The document contains recommendations and analysis regarding the decision and actions at hand.</p> <p>The recommendations were made to (NAME 4), and (NAME 5), both of whom have authority to take decisions and implement the actions by virtue of their employment duties.</p> <p>Having determined that subsection 16 (1)(a) applies to the information, the public body reviewed the circumstances listed in subsection 16 (2) and determined that none apply.</p> <p><b>Exercise of discretion:</b></p> <p>Before refusing access to the information the public body considered all relevant interests, including the public interest in disclosure and determined that none of the factors weighed in favor of disclosure.</p>
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